



DUSSAULT LAW GROUP

# Advance Planning and Legal Supports

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- This training and written materials are designed to provide accurate and authoritative information in regard to the subject matter covered as of the date of presentation, January 7, 2015. As with all legal information, subsequent changes in the law or the application to specific facts may change the accuracy or applicability of these materials. The materials are provided with the understanding that the presenters are not engaged in rendering legal, financial or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.
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# Agenda

- Vocabulary
- Description of Legal Tools
- Conflicts & Problems with no tools, improper use of tools
- Barriers to Proper Use of Tools
- Overcoming Barriers



# Vocabulary

- **Power of Attorney** – Private document to manage some or most decisions. Form approved by law.
- **Guardianship** – Court created relationship to manage some or all decisions.
- **Advanced Directive** (Advanced Medical Directive, Living Will) – Private writing to pre-indicate consent or lack of consent to medical care. Form approved by law.
- **POLST** (Physician's Orders on Life Sustaining Treatment) – Writing created with physician directing care for patients for whom death within one year is not unlikely.
- **Trust** – Private agreement to manage assets in a specific way.

# Legal Tools: Methods of Control

- Surrogate Decision Maker / Conferred Authority
  - Guardianship, Power of Attorney
- Directions to Provider
  - Advance Directive, POLST
- Voluntarily transferring control of assets
  - Use of trusts for financial management
  - Use of Representative Payee for benefits management

## Conferred Authority

- To make decisions on behalf of another adult, a person must be granted that authority by the adult, by the courts, or by operation of law.
- Ways decision making authority is conferred
  - Guardianship
  - Power of Attorney
  - Informed Consent Statute (RCW 7.70.065)



## Power of Attorney (POA)

- A legal instrument in which a person (the “Principal”) grants another person (the “Attorney-in-Fact” or “AIF”) the right to make decisions on his or her behalf
- “Capacity” to sign the Power of Attorney required
- The Principal does not lose the ability to make decisions
- Substituted judgment
  - Decisions principal would want made (if possible to determine)
  - Decisions in best interest of the principal
- Decisions of Principal “trump”
- POA is revocable
- Date of Effectiveness
  - Immediately (terminates on disability unless “Durable”)
  - Upon disability of the Principal



## POA Authority

- Scope of the AIF's authority determined by language in the POA
  - Financial
  - Health Care
- Broad language granting "all powers that the principal has" allows the AIF to make most decisions regarding the Principal's financial affairs and health care, including
  - Consent to most medical treatment
  - Buy or sell things
  - Enter contracts
- Language can be very specific and limited



## **Restrictions on POA Authority**

- Powers that must be specifically mentioned in the document:
  - The power to make gifts of the Principal's money or property
  - Change beneficiary designations
  - Similar powers specifically enumerated by statute
- Powers that cannot be given to an AIF at all:
  - The power to vote in public elections
  - The power to make or alter a will

## Guardianship

- A “guardian” appointed by Superior Court upon a finding of incapacity.
- Types of Guardianship:
  - Estate (financial)
  - Person (everything else!)
- Scope of Guardianship
  - Full
  - Limited



## Presumed Capacity

When an individual turns 18, she is an adult in the eyes of the law, presumed to be capable of making decisions on her own behalf unless/until the right is taken away by a court.

“...liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary...” (RCW 11.88.005)



# Establishing A Guardianship

- Court determines
  - Incapacity
  - Scope of the guardianship
  - Who should be appointed as guardian
- Process and Protections for Alleged Incapacitated Person
  - Petition the Superior Court to appoint a guardian.
  - Guardian ad Litem (“GAL”) appointed to investigate the petition and report to the Court.
- Right to object to the Petition & present objections to the Court.
- Right to be represented by counsel
- Right to a jury trial if requested
- Periodic Court Reporting Required

# Guardianship and POA Resources

- Guardianship
  - RCW 11.88 appointment, qualification and removal
  - RCW 11.92 powers and duties
- Powers of Attorney
  - RCW 11.94 Generally

# Advance Directive

- Appropriate for anyone, created by individual
- Directions to Health Care Providers re: Treatment
  - Statutory
  - Flexible (Mental Health, Typical Health, Alzheimer's, Five Wishes)
- To be Treated as Binding Statement of Consent / Lack of Consent by Health Care Providers
- Advantages and Disadvantages of Combining Power of Attorney and Advance Directive



# Advance Directive and Informed Consent

- History of Advance Directive is ability to determine and respect patient wishes when patient cannot provide / withhold consent
- Karen Quinlan case; recall Terry Schiavo more recently
  - Question was “What would the patient have wanted?”
- Despite their name, they operate in law as “Advance Consent”, not as “instruction”
  - Providers cannot be liable for actions properly taken relying on the AD
  - But, AD does not necessarily create liability for providers who do not follow it

# Advance Directive Resources

- Informed Consent Statute: RCW 7.70.065, 7.70.068
- Statutory form: RCW 70.122.030
- Statutory Mental Health: RCW 71.32
  - Form RCW 71.32.260
- Advocacy Group Form Directive (more detailed than statutory): <http://compassionwa.org/advance-directive/>



# POLST

- Medical rather than legal document (Physician assists in completing)
- Appropriate for anyone for whom the physician would not be surprised if they died in the next 6-12 months.
- Actionable medical order – to be followed by providers; more likely to be applicable in an emergent circumstance.
- Travels with patient, can apply in multiple settings
- Little flexibility
- Can be used regardless of capacity (signed by surrogate)

# POLST Contents

- CPR: Yes/No
- Interventions if pulse and/or breathing
  - Comfort measures
  - Comfort plus limited interventions
  - Full treatment
- Non-Emergency Preferences
  - Antibiotic use: none, comfort, life-prolonging
  - Medically assisted (tube fed) nutrition: no tube, trial period tube, long-term tube
  - Additional Orders

## POLST Resources

- <http://www.wsma.org/wcm/Patients/POLST.aspx>
- <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/PhysiciansOrdersforLifeSustainingTreatment>

# Trusts

- Separate legal entity
- Barrier between beneficiary and Trust assets
- Roles
  - Trustor or Settlor
  - Trustee
  - Beneficiary
- Basic Functions of a Trust
  - Safeguard assets
  - Financial Management
  - Distributions
- “Types” of Trusts are just restrictions on basic functions
- May be useful in planning for Medicaid eligibility



## **Representative Payee**

- Program through Social Security that allows an individual to receive benefits on behalf of another
- Must be used for beneficiary's benefit
- Reporting required



# Conflicts and Problems

## Lack of Planning / Late Planning

- Often makes it impossible to use the (inexpensive) tools that require participation of the incapacitated person:  
Power of Attorney, Advance Directive, Trust
- Difficulty acting quickly (typical guardianship takes 2+ months to establish)
- Addressing issues in crisis increases probability of conflict



# Conflicts and Problems

## Multiple plans

- Different children influence parent to make different Powers of Attorney and/or Trust arrangements
- Difficult to determine which is valid – question is whether the Principal was competent at the time of signing
- Clouds the guardianship process, if necessary



# Conflicts and Problems

## Incomplete plans

- Authority to access and act with finances covered (e.g. joint account, power of attorney) but protections not covered
  - Maintaining personal access to all assets
- Authority to access and act with health covered, but no clear direction
  - POA without Advanced Directive
  - No discussions with AIF regarding End of Life care





## Conflicts and Problems

### Too Much Authority Vested in Too Few People

- No oversight between financial and personal management
- Negligent care providers often will benefit from sooner death and/or preservation of resources prior to death
- Most decision-making arrangements involve little or no outside oversight

## Barriers

- Lack of Urgency
- Perceived Expense
- Lack of Knowledge
  - Failure to know of tools available
  - Failure to understand how tools available work – can create confusion and not resolve conflict (significant concern for people who want do not want invasive end of life measures).

## Barriers

- Lack of Available Attorneys-in-Fact, Fiduciaries, etc.
- Unwillingness to discuss end of life
  - Barrier to creation
  - Barrier to proper use even if created



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**Barriers**

Others?

## Overcoming Barriers

- Willingness to discuss end of life issues
- Statutory and advocacy group provided form documents to reduce cost
  - Risk because choices are often highly personal
- Raise awareness of tools, education regarding proper use



## Overcoming Barriers

- Establishing documents at appropriate times:
  - POA and Advance Directive: Adulthood
  - POLST as Recommended by Physician
  - Trust: With Estate Plan or none until below...
  - Revisit all upon:
    - Dementia suspicion / diagnosis
    - Significant reliance on caregivers
    - Periodically (every 5 – 10 years)
    - Other Significant change in circumstances or law

# **Overcoming Barriers**

Others?

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**Thank You!**

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